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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

No. 73-2020

October Term, 1973

REGINALD LEWIS,

Petitioner,

-against-

HUDSON WATERWAYS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REGINALD LEWIS, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reginald Lewis prays for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on April 15, 1974, affirming both an order and a judgment of the District Court.

Opinions Below

No opinion was rendered by the District Court with respect to the order or judgment here concerned. The order here concerned, following the first trial, appears on pages 1a-3a* of the Appendix and was entered on the 9th day of March, 1972. The opinion of the Court of Appeals on the appeal taken after the second trial appears on pages 4a-8a of the Appendix, and has not yet been officially reported.

*References are to the appendix unless otherwise stated.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutes Concerned

Title 46 USC 596

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel, the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. §4529; Dec. 21, 1898, c.28, §§4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, §3,38 Stat. 1164."

Title 46 USC 642

"Every master shall, not less than forty-eight hours before paying off or discharging any seaman deliver to him, or, if he is to be discharged before a Coast Guard official to whom the duties of shipping commissioner have been delegated, to such Coast Guard official, a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense be liable to a penalty of not more than $50. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered; and the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official log book, and shall, if required, produce such book at the time of the payment of wages, and, also, upon the hearing, before any competent authority, of any complaint or question relating to such payment." R.S. §4550; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

Questions Presented

1. May a trial judge for no reason appearing in the record set aside a jury verdict properly supported by the evidence after a trial in all respects properly conducted?

2. May a trial judge for no reason appearing in the record and without written application therefor by the other side set aside his own directed verdict?

3. Was plaintiff denied a fair trial on the issue of the

reasonableness of the withholding of his wages when the trial court permitted proof of two defenses, both outlawed by 28 U.S.C. 642?

Statement

Reginald Lewis was a merchant seaman aboard the U.S. Flag Transorleans, having joined the vessel on January 11, 1967 at Freeport in the Bahamas as an assistant engineer. He was injured on March 7, of 1967 and was discharged at Balboa Canal Zone, on April 15, 1967 for medical attention. The Master made up his pay voucher pursuant to the provisions of 46 U.S.C. 642, showing $3,965.69 to be due to Lewis, and also prepared a Standard Form of Mutual Release by the ship to the seaman, and the seaman to the ship. (13a)*

Because the Master claimed that he did not have the cash with which to pay Lewis, he endorsed the statements on the Mutual Release "Wages to be received in New York" and "No wages at this office", and the Shipping Commissioner required Lewis to sign his name opposite the statement. (13a)

The pay voucher contained the following certification:

> "I certify that this voucher is true and correct that the person named hereon was employed and has performed

*While the Court of Appeals claimed to find a rational basis for the subsequent jury verdict on the second trial in its statement that the second jury denied the liquidated damage because of the alleged "assignment" it is clear that on the first trial the jury found otherwise. Indeed, on the first trial it would appear that this was not the basis for the judge's action because he himself directed a verdict, whereas the alleged assignment would have forbidden such action. Furthermore, as appears later, this issue should never have been submitted to the jury on the Second trial.

the services for the period as stated and that he is entitled to the amount of pay as stated on this voucher.

P. Zambourous
Master" (12a)

Further, the Master was absolutely categorical in his testimony (by deposition) that he prepared both the Standard Release and the seaman's pay voucher himself, and that he discharged Lewis ashore with the intention and belief that Lewis would receive his wages from the Company in New York. His testimony was in part as follows:

Q. When you signed this paper, did you intend that he would get his money in New York?

A. It was the last minute when the ship's sailing, so I told him that I gave you the voucher, and you go to New York to collect it. That was the agreement with the Shipping Commissioner.

Q. That was your agreement and the agreement with the Shipping Commissioner?

A. Yes.

Q. So you sent him ashore knowing that he was going to agree to get his wages in New York?

A. Yes.

Q. You knew that when you sent him ashore?

A. Of course.

Q. That was the agreement, there is no doubt about it?

A. No.

Two days after his discharge on Monday, April 18, 1974, Lewis presented the voucher and the endorsed Mutual Release to the Paymaster in New York, who refused to honor it, pending instructions from the ship. Lewis requested payment again on April 19, and was refused and on April 20 was told that the ship had already paid his wages to the vessel's chief engineer. The chief engineer, who had in fact received the money, wired $3,000 of the $3,965.69 that was due, but retained $965.69. Lewis sued for $965.69 still unpaid and for two days' pay for each day that such wages were "unreasonably withheld" pursuant to the provisions of 46 U.S.C.A. 596. On the first trial, the defendant contended over objection by the plaintiff that it acted reasonably in making payment to Lewis because it claimed that he had not in fact worked the hours of overtime shown by the Master on the pay voucher and therefore had not in fact earned the $3,965.69 shown to be due on the wage voucher and certified by the Master thereon to be due.

The defendant also claimed that it had an "assignment" from Lewis directing the Master to pay the wages to the chief engineer upon presentation of the assignment and pay voucher.

There was proof by the plaintiff that both the overtime records on which the first contention depended and the alleged "assignment" were in fact forged: the jury necessarily found when answering interrogatories addressed by the trial Judge (7a) that:

1. The assignment was invalid.

2. The wages were unreasonably withheld.

On written motion papers, the defendant moved to set aside ". . . the jury verdict with respect to the reasonableness of the withholding of the plaintiff's wages. . ." *Neither the notice of motion nor the supporting affidavit contained any reference to or request for relief with respect to the directed verdict of the Court for the wages themselves which had been granted by the Court.*

In the oral argument of the motion, without explanation or justification for its action, the Court set aside the jury verdict, holding the wages to have been unreasonably withheld and directed a new trial. (4a)

The Court having announced its decision with reference to the jury verdict, defense counsel then stated orally to the Court that if the Court left the directed verdict for the unpaid wages, as distinguished from the liquidated damages stand on the new trial defendant would have difficulty defending the reasonableness of the withholding. In response to such statement the Court stated that it would also set aside the directed verdict. (4a)

Since the decision of the Court was not a final decision, no appeal could be taken from the actions of the Court at that time until the second trial that thereafter resulted. An application for certification pursuant to 1292(b) was denied by the trial judge.

Jurisdiction for seamen to sue in the Federal Court for wages withheld is expressly granted by the statute quoted, 46 USC 596 without limitation as to the amount in controversy.

ARGUMENT

The First Trial

The law with respect to the circumstances under which the trial court may set aside a jury verdict has become the subject of considerable disarray in the various federal courts. Thus, Moore on Federal Practice (2nd Edition ¶5908[5]) states that a motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. Also, that the grant or denial of the motion under the compulsion of a mistake of law is reviewable under unusual or special circumstances, and that the trial court's action may constitute an abuse of discretion and thus be reviewable.

In *Firemen's Fund Insurance Company v. Aalco Wrecking Company, Inc.*, 466 Fed.2d 179 decided August 7, 1972, the Court of Appeals for the Eighth Circuit, finding that the evidence was sufficient for the jury to pass upon, concluded that the trial court erred in granting a judgment notwithstanding the verdict in favor of the plaintiff and granting a new trial, and reversed the holding of the trial judge and reinstated the verdict.

In so doing that affirmed the authority of the case of *Lind v. Schenley*, 278 Fed.2d 79, wherein the Court of Appeals for the Third Circuit stated that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the Appellate Court should "exercise a longer degree of scrutiny and supervision in order to protect the litigant's right to a jury trial". In the *Lind* case, the Court of Appeals cited other cases from the Courts of Appeal of the Sixth and Fifth Circuits.

By contrast, in the instant case, the Court of Appeals for the Second Circuit, making practically no reference other than a footnote (7a) to the appeal from the First Trial did so on the authority of *Portman v. American Home Products Corp.*, 201 Fed. 2d 847. The *Portman* decision had held that (201 Fed.2d 848):

> "There may be errors that are not reviewable at all and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence."

Despite the reference to *Portman*, as the basis for giving such short shrift to the plaintiff's appeal from the orders of the first trial hearing, it is to be noted that the Second Circuit had in other cases reversed such rulings by a trial court and reinstated a previous verdict. *Berner v. Pacific Airlines Limited*, (CA 2d 1965) 346 Fed.2d 532.)

In the *Lind* case, 278 Fed.2d 79 the Court of Appeals stated the rule as follows (278 Fed.2d 90):

> "New trials granted because (1) a jury verdict is against the weight of the evidence was readily distinguished from (2) new trials ordered for other reasons: for example evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance—it is the jury which fails improperly to perform the functions confided to it by law. In the latter instance something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a

distorted, incorrect or incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. . . . Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts of the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

"But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigant's right to jury trial."

On the argument of this appeal, on questioning by the Court, counsel for the appellee admitted that he could not state that there was not sufficient evidence to support the verdict. Nor, does the defendant point to any other respect in which any "undesirable or pernicious element" occurred or was introduced

into the trial. There was no claim of evidence improperly admitted on behalf of the plaintiff, of any prejudicial statement by counsel, claim of improper charge to the jury or newly discovered evidence. The trial was in all respects regular.

What the rationale behind the trial judge's setting aside of the jury verdict, or even of the setting aside his own directed verdict for the wages themselves nowhere appears. While it is possible that the Court had something in mind, there is nothing in the record to justify the claim that what he did was not done for an improper reason. Under such circumstances, the mere determination itself becomes arbitrary. A determination without a rational basis for it is an arbitrary determination.

Furthermore, where it is possible that a determination may have been made for a good reason or for a poor one, and which of the two does not appear, the result may be overturned since the result could just as well have been for the wrong reason. *United N.Y. & N.J.S.H. Pilots Association v. Halecki*, 358 U.S. 613, 619. The holding of this case, therefore, in its reliance on *Portman, supra*, together with the holding of the *portman* case itself, are therefore, in direct conflict with the holding of the cases of the other circuits cited with respect to the reviewability of the decision of the district court to set aside a jury verdict. The holding that a district judge may set aside a jury verdict for unexpressed reasons, amounting to no more than the fact that he as trier of the fact would have held otherwise, amounts to a substitution of his verdict for that of the jury, and by such token a denial of the jury trial accorded by the Seventh Amendment of the Constitution.

The Second Trial

It is respectfully submitted that serious error was committed by both trial courts with respect to their handling of the provisions of Title 46 U.S.C.A., Section 642. 46 U.S.C.A. 642 provides:

> "Every Master shall, not less than 48 hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a coastguard official to whom the duties of Shipping Commissioner have been delegated, to such coastguard official a full or true account of his wages and of deductions to be made therefrom on any account whatsoever. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed unless it is included in the account delivered; . . .".

Clearly, both of the defendants' contentions with respect to which it was permitted to defend, that the plaintiff had not earned all the overtime hours shown by the Master and thus was not entitled to be paid $3,941.69 shown on the seaman's wage voucher, and the further contention with respect to the "assignment", both contentions permitted over the proper objection of plaintiff's counsel, related to matters occurring *after* the delivery of the wage account to the plaintiff. Both were therefore contrary to the provisions of the statute and were in effect impermissible or illegal defenses. While there have been no cases interpreting the provisions of Section 642 since the effective date of its enactment, or of the statute from which it was derived, which was the Act of June 7, 1872, Chapter 322, Section 23, the language of 642, it is plain that the Master having rendered his account to the seaman, the ship owner and

the Master are forbidden thereafter to make any deduction with respect to anything occurring prior to the rendition of the account for any reason whatsoever.

It is clear beyond argument and has been the subject of discussion in many cases that one of the all pervading purposes of the Seamen's Act, particularly as reflected in 46 U.S.C.A. 596, 597 and 642 was to prevent exactly what the appellee is now seeking to defend. That is, to withhold wages from a seaman on the basis of after-acquired reasons for doing so.

It is clear beyond argument and has been the subject of discussion in many cases that one of the all pervading purposes of the Seaman's Act, and particularly as reflected in 46 U.S.C.A. 596, 597 and 642, was to prevent exactly what the appellee is now seeking to defend; that is, to withhold wages from a seaman under pretext that there are "reasons" for doing so.

The entire statute was for the protection of notoriously helpless seamen to secure for them a prompt payment of the wages that is due to them. The appellee complains that the appellant has cited no cases under 642, but it is obvious that there have been no cases, so clear are the express terms of the statute, knowledge of which the appellee is chargeable with.

Further, according to the holding of *Isbrandtsen v. Johnson*, 343 U.S. 779, *Shilman v. United States*, 164 F.2d 649, cert. den'd. 333 U.S. 837 and Norris, The Law of Seamen (Third Edition) §§355, 356, 392 and 536, the deduction which the appellee would not withhold, is clearly forbidden since it is not one specifically listed in the deductions permissible by statute.

Thus, see *Mavromatis v. United Greek Shipowners Corporation*, 179 F.2d 310, 314.

> "As stated in Shilman v. United States, 2 Cir. 1947, 164 F.2d 649, 650, certiorari denied 1948, 333 U.S. 837, 68 S.Ct. 608, 92 L.Ed. 1122, under the provisions of the Seaman's Act a seaman is entitled to payment, at the termination of his employment, of all of his earned wages, without any deductions except those which are expressly authorized by statute."

At the first trial the failure of the court to charge the jury with respect to the contents of 642 caused the plaintiff no damage. He prevailed in any event.

The failure of the court to so charge at the second trial was clearly prejudicial to the plaintiff's presentation of his case. There was prejudice in the first place as bearing on the issue of whether or not the appellee should promptly have paid this money to the plaintiff. It was further prejudicial in permitting the jury to consider issues on which the appellee was permitted to defend, issues which were irrelevant, or in any event, that might have been considered differently with the statutory mandate before it. Obedience to the statute would have precluded either of the claims on which the defenses were based. In any event the jury would have been entitled to consider these defenses in the light of the specific words of the statute.

In this light it is respectfully submitted that it was incumbent on the trial court to direct a verdict for the plaintiff with respect to the stated $965.00 withheld. And in any event, if it was not correctly so minded, to have advised the jury of the contents of

the section. Both applications were made to the court, refused, and exception taken.

Should the verdicts of the first trial not be reinstated, the verdict of the jury denying liquidated damages should be set aside and the matter returned to the lower court for a new trial.

The entire purpose of rules relating to exclusion of evidence, framing of issues, and exclusion of irrelevant issues is to keep within rational bounds the matters that a jury consisting of laymen should properly consider. To have permitted the presentation of two entirely irrelevant defenses, and to also have prevented the plaintiff from making reference to the plain terms of the statute which made them irrelevant was just as much a denial of a proper jury trial, as to have refused the empanneling of the jury in the first place.

Reasons for Granting the Writ

It is respectfully submitted that this petition presents meritorious reasons of importance for the granting of this writ. They are

1. The Court of Appeals for the Second Circuit herein has made a decision in conflict with the decisions of other courts of appeals on the same matter with respect to the reviewability of the decision of a district court setting aside a jury verdict and granting a new trial,

2. The decision of the Court of Appeals for the Second Circuit herein has in effect denied the plaintiff the jury trial accorded him by the Seventh Amendment of the Constitution

(a) in affirming the order of the district judge setting aside the jury verdict at the First Trial,

(b) in affirming the verdict at the Second Trial wherein the jury was permitted and by the charge of the court in effect directed to consider matters forbidden by statute to be considered and irrelevant to the issues of this case, and

(c) the matters in question are common to the trial of most seamen cases, matters with respect to which this Court has always exercised the power of supervision and which in this case require the exercise of such power of supervision.

CONCLUSION

THE VERDICTS OF THE FIRST TRIAL SHOULD BE RE-INSTATED; ALTERNATIVELY, THE MATTER SHOULD BE REMITTED TO THE LOWER COURT FOR NEW TRIAL CONSISTENT WITH THE PROVISIONS OF 46 U.S.C. 642.

REGINALD LEWIS, Petitioner

By NATHAN BAKER
Counsel for Petitioner
1 Neward Street
Hoboken, New Jersey 07030

HERBERT LEBOVICI
Of Counsel

Dated: New York, New York
July 8, 1974

Order at First Trial Setting Aside Verdicts and Remanding Case for New Trial

The above entitled action having been duly brought to trial on the 20th day of January, 1972, before JUDGE DUDLEY B. BONSAL and a jury of six,

And the issues of fact having been duly submitted to the jury on the 24th day of January, 1972,

And pursuant to the instructions of the Court, the jury having returned the Special Verdict, a copy of which is annexed hereto and made a part of this order,

And the Court, on January 24, 1972, having withheld the entry of judgment on the verdict until the further order of the Court,

And the Defendant having moved by Notice of Motion dated the 2nd day of February, 1972, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for an order setting aside the jury verdict on all the issues and entering judgment for the Defendant notwithstanding the verdict, or in the alternative for a new trial on all the issues submitted to the jury pursuant to Rule 59 (a-1) of the Federal Rules of Civil Procedure, or in the further alternative, for a new trial unless the Plaintiff agrees to a remittitur pursuant to Rule 59 (a-1) of the Federal Rules of Civil Procedure,

NOW, on reading and filing the said Notice of Motion dated the 2nd day of February, 1972, and the supporting affidavit of VICTOR S. CICHANOWICZ, duly sworn to the 2nd day of February, 1972, the affidavit of HERBERT LEBOVICI, in

opposition thereto, sworn to the 4th day of February, 1972, the reply affidavit of VICTOR S. CICHANOWICZ, sworn to the 7th day of February, 1972, and the said motion having come on to be heard before me on the 9th day of February, 1972, and after due deliberation having been had, it is

ORDERED that insofar as the application is made to alter, modify or set aside the jury verdict with respect to the Plaintiff's claim for damages for injury sustained as a result of the unseaworthiness of the vessel or negligence of the Defendant, or insofar as the Defendant's application is made to alter, modify or set aside the Special Verdict of the jury with respect to questions and answers therein numbered 1 through 7 inclusive, the said application of the Defendant is in all respects denied; and it is further

ORDERED, adjudged and decreed that the Plaintiff shall recover of the Defendant $20,400 pursuant to Items 1 through 7 of the Special Verdict with interest from the 24th day of January 1972; and it is further

ORDERED upon the agreement of both parties that the Plaintiff shall additionally recover of the Defendant $720.00 for maintenance; and it is further

ORDERED that with respect to the receiving by the plaintiff of $20,400.00 and $720.00 as aforesaid, it is expressly determined that there is no just reason for delay of the entry of judgment herein and the entry of such judgment is expressly directed; and it is further

ORDERED that the plaintiff shall have execution on the judgment so entered; and it is further

ORDERED that the issues stated in the Complaint in the first and second causes of action therein shall be, and they hereby are, severed from the other issues in the case; and it is further,

ORDERED that the ruling by the Court before the submission of the issues to the jury that it "would direct a verdict for $965." for plaintiff and that it "will so rule" be and the same hereby is withdrawn; and it is further

ORDERED that Item 8 of the Special Verdict of the jury herein, finding that the defendant unreasonably withheld plaintiff's wages be, and the same hereby is, set aside; and it is further

ORDERED that the claims of plaintiff relating to his right to recover $965.69 and the right of plaintiff to recover under the provisions of Title 46 U.S.C.A. §§596 and 597 and the same hereby are, remanded to the Calendar Part of this Court for new trial.

Dated: New York, New York
March 9, 1972

DUDLEY B. BONSAL
U.S.D.J.

JUDGMENT ENTERED 3/9/72

John Livingston
Clerk

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 711—September Term, 1973.
(Argued March 25, 1974 Decided April 15, 1974.)
Docket No. 73-2684

REGINALD LEWIS,

Plaintiff-Appellant,

v.

HUDSON WATERWAYS CORPORATION,

Defendant-Appellee.

Before:

KAUFMAN, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from that portion of a judgment entered on a jury verdict in the United States District Court for the Southern District of New York, thomas P. Griesa, *Judge,* denying the double-wage penalty for withholding of seaman's wages at discharge.

Affirmed.

HERBERT LEBOVICI, Esq., New York, N.Y. (Lebovici & Safir, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

VICTOR S. CICHANOWICZ, Esq., New York, N.Y. (Cichanowicz & Callan, New York, N.Y., on the brief), *for Defendant-Appellee.*

PER CURIAM:

Reginald Lewis joined the SS Transorleans at Freeport, Bahamas on January 11, 1967, as an assistant engineer. Chief Engineer Lewis Molnar, a friend who had found the job for him, had told the ship's Master that Lewis possessed the requisite credentials to serve as a third engineer. After the ship left Freeport en route to Bombay, India, however, the Master discovered that Lewis had no such papers and had to sign him on as an uncertified utility engineer.

On March 7, Lewis injured his back while repairing the ship's boiler. Prior to the injury, he had stood watch and accumulated overtime, which were duly recorded in the ship's engineering log by his friend, Molnar. After the injury, he seldom worked, but Molnar apparently continued to record overtime for him. Lewis was discharged for medical attention at Balboa, Canal Zone, April 15. The Master had no cash available to pay him but offered him a voucher showing salary due of $3,965.69, and the total hours worked, including overtime, for presentation to the paymaster in New York. Lewis accepted the voucher and signed a release of all of his claims against the ship.

The Master testified that at discharge Lewis asked that his salary be paid over to Molnar and so endorsed the voucher. The Master further stated that he had instructed Lewis to implement this action by an assignment to Molnar. Sometime after Lewis left the ship, Molnar presented such an assignment to the Master and subsequently received the amount due. Lewis, however, claims he never made any assignment and that he always intended to receive personal payment in New York.

Two days after discharge, Lewis presented the voucher to the paymaster in New York City who refused to honor it pending instructions from the ship. On April 20, he informed Lewis that the ship had already paid Molnar. Lewis telephoned Molnar, who telegraphed $3,000 to him but retained $965.69 as a commission for having procured the job for him.

Lewis did not protest the ship's payment to the Chief Engineer until two months later when he instituted a suit claiming unpaid wages totaling $965.69 and a double-wage penalty under 46 U.S.C.A. §596 for every day that the ship "unreasonably" withheld his salary. During pre-trial discovery, the ship learned for the first time that Lewis, in fact, had been bedridden when the ship's records showed that he had been working overtime. Lewis, however, contends that he worked the total hours recorded, although he admits he did not work them at the times indicated.

The only issues below were whether the voucher accurately stated the wages due, and whether the ship acted reasonably by paying Lewis' wages to Molnar.

The trial court allowed the ship to introduce Lewis' admission that he had not worked at the actual times recorded and Lewis

appeals, claiming that this evidence was barred by 46 U.S.C.A. §642 which provides that "no deduction for the wages of any seaman" shall be allowable if not stated in the voucher presented at discharge. This provision is to be read in connection with the Seamen's Acts, 46 U.S.C.A. §§591, et seq., which look towards "payment to the seaman by his employer, at the termination of employment, of all his earned wages, without any deductions except those which are expressly authorized by statute." *Shilman v. United States*, 164 F.2d 649, 650-651 (2 Cir. 1947), *cert. den.* 333 U.S. 837 (1948).

To comply with the statutes the master must present the voucher to the seaman forty-eight hours prior to discharge in order to allow him to protest to the ship, the Coast Guard, or the United States consul if such wages are reduced for reasons not permitted by statute. 1 Norris, *The Law of Seamen* §536 (1970). If the master were to certify a voucher and then refuse to pay a seaman discharged in a distant port, he "easily could wipe out every cent of a seaman's earned wages." *Isbrandtsen Company, Inc. v. Johnson*, 343 U.S. 779, 788 (1952). After payment, the ship may bring an action for fraud against a seaman like Molnar or Lewis for reporting inaccurate hours, but ordinarily a court will not allow a ship to introduce evidence of hours actually worked to disprove the accuracy of its own voucher in a suit for wages.

The trial judge's error in admitting this evidence, however, did not prejudice Lewis because the jury necessarily found the voucher correct when it awarded the salary balance of $965.69. Lewis' contention that the evidence of the false overtime caused the jury to deny him the double-wage penalty is unpersuasive. The withholding at discharge was caused by the purported assignment, not by the overtime inaccuracies which only became

apparent at the commencement of trial; and although the jury in special verdicts found the assignment invalid, it also specifically found that the ship had not acted unreasonably in paying Molnar the sum due Lewis. Moreover, the ship's claim that it had a basis for withholding any further payments when it learned of the overtime inconsistencies was rejected by the jury when it found the voucher valid.

The penalty, now approximately $90,000, is only to be imposed for " 'arbitrary and unscrupulous action,' " *McCrea v. United States*, 294 U.S. 23, 30 (1935), and ". . . [t]here is neither justice nor policy in aiding [this plaintiff] to catch at penalties, when [he] has suffered no wrongs." *Petterson v. United States*, 274 F. 1000 (S.D.N.Y. 1921) (L. Hand, J.).

The judgment of the district court is affirmed.

Special Jury Verdict on First Trial

(Same Title)

1. Was the *SS TRANSORLEANS* unseaworthy with respect to Plaintiff's alleged accident on March 7, 1967? A. Yes.

2. Was the Defendant Hudson Waterways Corporation or any of its employees negligent with respect to the alleged accident? A. Yes.

If your answers to questions 1 and 2 are "No", your verdict must be for the Defendant. If your answer to either question 1 or 2 is "Yes", answer question 3.

3. Was such unseaworthiness or negligence a proximate cause of the accident sustained by the Plaintiff? If your answer is "No", your verdict must be for the Defendant. A. Yes.

4. If your answer to question 3 is "Yes", what was the total amount of damage suffered by Plaintiff by reason of the accident? A. !25,500.

5. Was the Plaintiff *Reginald Lewis* negligent, which contributed to his accident? A. Yes.

6. If your answer to question 5 is "Yes", to what extent did Plaintiff's negligence (contributory negligence) contribute to the accident? (State in Terms of percentage.) A. 20%.

7. If your answer to question 5 was "Yes", apply the percentage stated in answer to question 6 to the amount of damages

stated in answer to question 4, and subtract this amount from the damages stated in answer to question 4, and the result will be your verdict for the Plaintiff. A. $20,400.

8. Did Defendant unreasonably withhold Plaintiff's wages? A. Yes.

Mrs. Violet Walsh
Foremar

Court's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Jan 24, 1973
1 id

Seaman's Pay Voucher (In Evidence)

[illegible] CARGAS CORPORATION a/s "TRANSORIGANS" Voyage No. 17

[illegible] YORK Port BALBOA, C.Z. Date APRIL 15-

Name REGINALD G. [illegible] Rating 3RD ASST ENGINEER Soc. Sec. No. 092-42-455

770 EAST 22/ ST. BROOK.65 N.Y.

Citizen ☐ Resident Alien ☐ Non Resident Alien ☒

Credits:

Wages: Earned ☐ Vacation ☐ Other ☐

From 1-11-57 To 4-15-57 3 Mos. 5 Days [illegible] Hrs. @ 662.01 Per Mo. $ 2.096.

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

Bonuses:

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

Overtime: (Attach Supporting Overtime Sheet) 7/8 Hours @ 4.23 Per Hour 3.375

[illegible] Hours @ [illegible] Per Hour [illegible]

Extras: [illegible]

5

Total Earnings ..... $ 5.471.

Deductions:

Remarks

FOR OFFICE USE ONLY

Set Up For Taxes

P/R #

By

Credit to Master's Account

No.

By

Social Security Tax Computation:

Total Earnings as Above 5.471.91

Board & Lodging 95 Days

@ 1.60 Per Day 149.00

Total Taxable @ 4.4% 5.620.91

Deductible Social Security Tax 247.32

Withholding Tax ☐ Days—Exemptions ☐ N.R.A.

Tax Total Earnings as Above

Non Resident Alien Tax Computation:

Total Earnings U. S. Waters ....

Less Exemption Days

@ $1.70 Per Day ....

Taxable Amount at 30% ....

Deductible Alien Tax ....

Allotments ....

Slop Chest 85.90

Advances 1173.00

Fines .....

Others .....

PLAINTIFF Exhibit 2

Total Deductions ..... $ 1.506.

Sub Balance ..... $ 3.965.

Maintenance Allowance Ashore:

Meals: From [illegible] To [illegible] @ [illegible] Per Day ....

Room: From [illegible] To [illegible] @ [illegible] Per Day ....

Transportation: From [illegible] (Port) To [illegible] (Port) ....

Net Amount Due ..... $ 3.965.

I certify that this voucher is true and correct that the person named hereon was employed and has performed the services for the period as stated above; and that he is entitled to the amount of pay as noted on this voucher.

[illegible]
Master

Pd. at Port of [illegible]

By [illegible] (Please Fill in Payees Name)

Master ☐ Agent ☐

Received the above in Full Payment for Service to Date:

R. Reginald
Seaman's Signature

Paid in Full Before Me:

U. S. Shipping Commissioner—Consul—Authorized Agent

FORM P-4

Mutual Release (In Evidence)

...PANAMA CANAL
...

MUTUAL RELEASE
TRANS ORLEANS

We, the undersigned, seaman on board the TRANS ORLEANS 242223 on her late voyage from SAN PEDRO to GALVESTON do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I, master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

Dated... APRIL 15TH 1967 ... ...

ATTEST as to said master and the seamen whose signatures appear below.

Reginald G Lewis	UTY ENG.	4-11-1967	4-15-1967	4.85 8.67	1506.22 5471.91	965.59

WAGES TO BE RECEIVED IN NEW YORK
REGINALD G. LEWIS

NO WAGES AT THIS OFFICE

CERTIFIED TO BE AN AUTHENTIC XEROX COPY OF DISCHARGE EXECUTED IN THIS OFFICE ON APRIL 15, 1967, COVERING REGINALD G. LEWIS, CREWMEMBER OF THE TRANS ORLEANS.

WILLIAM W... HAYLE
DEP. SHIPPING COMM.-IN-CHARGE
BALBOA, CANAL ZONE
MAY 1[illegible] 1967

DATE 1/31/67
WITNESS

SUPREME COURT, U. S.
FILED
AUG 8
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2020

REGINALD LEWIS,

Petitioner,

against

HUDSON WATERWAYS CORPORATION,

Respondent.

BRIEF OF RESPONDENT HUDSON WATERWAYS CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ,
Attorney for Respondent,
80 Broad Street,
New York, N. Y. 10004.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2020

REGINALD LEWIS,

Petitioner,

against

HUDSON WATERWAYS CORPORATION,

Respondent.

BRIEF OF RESPONDENT HUDSON WATERWAYS CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Second Circuit is reported at 495 F.2d 604.

Jurisdiction

The jurisdiction of this court has been invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

In order to reach the questions presented in the petition, it is necessary to assume facts which are contrary to the record in this case. They are (1) that there is no reason in the record for setting aside a verdict and granting a new trial even though (a) the trial judge specifically reserved further argument as to the sufficiency of the evidence, until after the return of the jury verdict and (b) sufficiency of the evidence was one of the reasons urged in the motion papers; and (2) that Section 642 of Title 46 U.S. Code applies even though it is undisputed that the respondent paid in full and did not deduct anything from the amount stated to be due according to the wage voucher.

Statement of the Case

On April 15, 1967 petitioner, a seaman, was discharged from the service of the SS TRANSORLEANS, a vessel owned by respondent, for medical attention. The discharge took place at Balboa, Canal Zone when the vessel arrived at that port prior to transiting the Panama Canal en route to its final port of discharge at Houston, Texas.

In conjunction with petitioner's discharge, the vessel's master prepared a wage voucher (Exh. 2). This voucher showed a balance of $3,965.69 to be due. It consisted of wages for the period January 11, 1967 to April 15, 1967 together with overtime totaling 798 hours and board and lodging less certain allowable deductions.

Since the ship's Master did not have sufficient cash available and April 15, being a Saturday, and the agent at Balboa was unwilling to advance the funds or telex New York because he did not wish to delay the vessel, the voucher was accepted by the petitioner for payment on presentation to the paymaster at New York.

As the Court of Appeals has noted prior to leaving the vessel at Balboa, according to the vessel's Master petitioner advised the Master that he might have his friend, the Chief Engineer Molnar collect the balance shown on the voucher to be due at the final port of discharge. The Master further testified that if petitioner elected to do this no payment would be made without a written assignment to the Chief Engineer.

Petitioner's uncertainty as to his plans stemmed from the fact that he was a Jamaican citizen who was residing in the United States under a visitor's visa and therefore was not sure whether he would be allowed to enter the United States to collect his wages.

Two days after his discharge petitioner presented a voucher to the paymaster in New York City. The paymaster informed the petitioner that he could not honor the voucher until he received instructions from the vessel. On April 19 the vessel arrived in Houston. On April 20, after contacting the vessel, the paymaster informed the petitioner that the ship had paid the monies to the Chief Engineer Molnar. Though on the trial petitioner claimed that he never made an assignment and that it was always his intention to receive personal payment in New York, he made no protest when he was advised that the money had been paid to the Chief Engineer. Instead he took the telephone number of the hotel where the Chief Engineer was staying and subsequently telephoned the Chief Engineer. According to petitioner Molnar telegraphed $3,000.00 to him but retained $965.69 as a commission for having procured petitioner his job.

Furthermore even though petitioner received only $3,000.00 from Molnar on April 21, 1967 he took no steps so to advise the respondent. Instead some two months later his attorneys advised by letter that they had been retained by the petitioner to prosecute his claim for injuries and for wages due and liquidated damages pursuant

to the provisions of 46 USCA Section 596 and 597 by reason of the withholding of wages from him (Exh. 4, *infra*, p. 13).

Subsequently suit was commenced and during pre-trial discovery, respondent learned for the first time that petitioner denied that he executed the assignment and that he had been bedridden when the ship's records showed that he had been working overtime. While petitioner admitted that he did not work overtime at the times indicated he contended that he worked the total hours recorded.

On the trial petitioner was unable to indicate when the overtime hours credited to him while he was bedridden were worked. Furthermore other than his own denial he offered no proof to dispute respondent's handwriting expert that the signature on the assignment was that of the petitioner.

On the trial as well as in its petition, petitioner concedes that the shipowner paid and the Chief Engineer in fact received the entire amount of $3,965.69 stated to be due according to the voucher (Petition p. 6). Petitioner however urges that because the respondent elected to stand on the assignment and contest in good faith its liability to pay the $965.69 a second time the refusal to pay again is somehow converted into a deduction within the meaning of Section 642 of Title 46 USC.

The petition also disregards the record and seeks review on issues which do not exist in this case. It asserts that on the first trial the trial judge set aside a jury verdict after a trial in all respects properly conducted and for no reason appearing in the record and that the trial judge set aside his own directed verdict for no reason without written application therefor.

On respondent's motion for a directed verdict at the end of the entire case, the trial court stated:

> "I am going to let it go to the jury. I will hear what you have to say afterwards on that. I have a real

question in my mind as to the wages, the wage part of it, but I can't see from the evidence that this was arbitrary action on the part of the steamship company, but I am going to let it go to the jury and see what they say." (Doc. 23, Minutes of First Trial, p. 7).*

In ruling on the requests to charge prior to the submission of the case to the jury, the trial judge refused to charge the jury that if they found that petitioner authorized the Chief Engineer to receive the wages he could not recover any part thereof (114a-115a).

Following its charge to the jury the trial court overruled respondent's exception to the charge that to constitute sufficient cause it is not necessary that the reason for withholding be based on some legal ground. (*Infra*, p. 14).

While the trial judge in the course of the colloquy which took place prior to the submission of the case to the jury did state that he "would direct a verdict for $965" and that it "will so rule" it responded to petitioner's counsel's statement that "In other words, I assume that I will get a directed verdict for the $965" with a "No". (Doc. 23, Minutes of First Trial, p. 13).

Following the return of the jury verdict, the trial court withheld entry of judgment on the verdict until further order of the Court (169a) and granted respondent leave to move with respect to the verdict on written motion papers.

In its motion papers respondent moved for judgment notwithstanding the verdict or in the alternative for a new trial. One of the grounds for the new trial was that the verdict was against the weight of the evidence (125a).

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* References are to appendix or record in the Court of Appeals unless otherwise indicated. References followed by the letter "a" are to appendix. References commencing with "Doc." are to the document number and page in the record.

The sufficiency of the evidence was argued in the motion papers which were filed by both parties as well as orally. The trial court did not order a new trial with respect to the $965.59 because respondent said it would have difficulty defending the reasonableness of the withholding as petitioner asserts. No such statement was made. The trial court refused to direct a verdict on the motion because of the assignment and the question whether the sum which petitioner was claiming represented wages actually earned.

ARGUMENT

I

The decisions below were clearly correct.

The Court of Appeals was correct in holding that in accordance with *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2 Cir. 1953), orders granting or denying motions to set aside verdicts on the grounds that they are against the weight of the evidence and the granting of a new trial are not reviewable.

In *Portman* v. *American Home Products Corp., supra* the Court followed the rule laid down by this Court in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481, and has been reaffirmed in cases such as *United States* v. *Socony-Vacumm Oil Co.*, 310 U.S. 150, 247, *United States* v. *Johnson*, 327 U.S. 106, 111 and *Cone* v. *West Virginia Pulp and Paper Co.*, 330 U.S. 212, 215, 216.

Petitioner is confused between a motion for a new trial and a judgment notwithstanding the verdict when he urges that the setting aside of a verdict and the granting of a new trial denies him the jury trial guaranteed by the Seventh Amendment of the Constitution. A trial court's reexamination of the facts, on a motion for a new trial is in accordance with the rules of the common law and hence does

not violate the Seventh Amendment. 6A Moore, Federal Practice, 3816 (2d ed. 1973). Cf. *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 251.

Petitioner is in error when he urges that the trial judge must state the reason for setting aside the verdict and ordering a new trial otherwise it must be assumed that the Court acted arbitrarily. There is no rule which requires that on a motion for a new trial the reasons for the order must be specified. In *Gilliland* v. *Lyons,* 278 F.2d 56, 59 (9 Cir. 1960). The Court said:

> "As a general rule, no reasons are required; the grounds for the motion are obtained from those stated in the motion."

See *Cherokee Laboratories, Inc.* v. *Pierson,* 415 F.2d 85, 91 (10 Cir. 1969), *cert. den.* 396 U.S. 1059.

The fact is that the trial court gave its reason when it reserved further argument until after the return of the jury verdict.

In this case, the trial court at all times indicated that foremost in its mind was the sufficiency of the evidence.

Insofar as the alleged direction of the verdict is concerned, the trial court was free to change its mind, if it was so disposed, at any time before the entry of judgment, even without an application. Rule 54 of the Rules of Civil Procedure 28 U.S.C.A. *infra,* p. 12 provides that in multiple claims, such as were before the court, an order or form of decision may be changed at any time before the entry of judgment, unless there is an express determination that there is no just reason for delay and an express direction that judgment be entered on one of the claims. There was no such determination nor express direction on the first trial. In fact the trial judge expressly refused to direct a verdict. Doc. 23, Minutes of First Trial, p. 13).

II

The decision of the Court of Appeals is not in conflict with decisions of other Courts of Appeal.

Petitioner erroneously asserts that the circumstances under which a trial court may set aside a jury verdict has become the subject of "considerable disarray" in the federal courts and refers to Moore on Federal Practice and cites the cases of *Fireman's Fund Insurance Company* v. *Aalco Wrecking Company,* 466 F.2d 179 (8 Cir. 1972); *Lind* v. *Schenley Industries,* 278 F.2d 79 (3 Cir. 1960), and *Berner* v. *Pacific Airlines Ltd.,* 346 F.2d 532 (2 Cir. 1965) as examples thereof.

In 6A Moore, Federal Practice (2d Ed. 1966) Sec. 59.08 [5] at page 3819 it says:

> "The trial judge, exercising a mature and judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set aside the verdict; otherwise not."

In *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc., supra,* the court stated at page 187:

> "Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice occurred."

Lind v. *Schenley Industries, supra,* does not lay down a different rule. It merely holds that when a new trial is granted because the verdict is against the evidence, an appellate tribunal exercises a closer degree of scrutiny than when the issue is trial error.

As a matter of fact, under the cases cited a new trial was mandatory because the court also improperly charged the jury. Assignments of wages are valid unless made prior to the accrual thereof. Section 601 of Title 46 U.S.C.A. (*infra,* pp. 12-13). The trial court, on the first trial however, refused to so charge (114a-115a). Cf. *The George Wells,* 118 Fed. 761, 762-763 (D.C. Mass. 1902).

Respondent also excepted to the trial court's failure to charge that it was not necessary that to constitute sufficient cause the reason for withholding had to be based on a legal ground. As this court pointed out in *McCrea* v. *United States,* 294 U.S. 23, 30, "without sufficient cause" means something more than the absence of valid defenses. It is sufficient if the refusal to pay is in some degree morally justified, *Collie* v. *Fergusson,* 281 U.S. 52, 56.

See also *The Velma L. Hamlin,* 40 F.2d 852, 854 (4 Cir. 1930); *The Cubadist,* 252 Fed. 658, 662 (D.C. Ala. 1918); *The Thomas Tracy,* 24 F.2d 372, 374 (2 Cir. 1928), cert. den. 277 U.S. 595; *Petterson* v. *United States,* 274 Fed. 1000, 1003 (S.D.N.Y. 1921); *Swain* v. *Isthmian Lines, Inc.,* 360 F.2d 81, 87 (3 Cir. 1966).

A new trial therefore was properly granted.

III

The trial court properly interpreted the applicable law on the second trial.

On the second trial, the trial court did not commit error in permitting respondent to introduce petitioner's admissions that he had not worked at the actual times recorded.

This court as well as other Federal Courts, have been specific that the penalties prescribed by Section 596 of Title 46 U.S. Code do apply except when the monies withheld are wages actually *earned* (Emphasis supplied). In *Isbrandtsen Company, Inc.* v. *Johnson,* 343 U.S. 779, 788, when this court held that no deductions or set-offs for derelictions of duty could be made, except those prescribed by statute, it pointed out that legislation which was enacted for the benefit of seamen looked towards the payment of *earned* wages (Emphasis supplied).

In *Ladzinski* v. *Sperling Steamship & Trading Corp.,* 300 F. Supp. 947 (S.D.N.Y.), the court in an extended opinion reviewed the various statutes dealing with seamen's wages, the cases interpreting them, and the Congressional intent and found that unless the monies claimed represent sums due for *services actually performed,* the penalties prescribed by Section 596 of Title 46 U.S.C.A. cannot be imposed.

In *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940) the court rejected the contention that a war bonus did not constitute wages within the meaning of 46 U.S.C. 596 and 597 and held that because it was compensation for *services actually rendered,* it was in fact and in law a part of the seaman's wages. To the same effect see *Glandzis* v. *Callinicos,* 140 F.2d 111 (2 Cir. 1944) (war bonus) and *Monteiro* v. *Sociedad Maritima San Nicholas, S.A.,* 280 F.2d 568 (2 Cir. 1960) cert. den. 364 U.S. 915 holding that overtime because it is compensation for *services actually rendered,* falls within the definition of 46 U.S.C. 596.

It would, therefore, have been prejudicial error to exclude such testimony.

CONCLUSION

The petition fails to present any important reason for granting a writ. No substantial question is raised, and there is no conflict of decision. Moreover, the questions attempted to be raised are not in accord with the record in this case.

The proceedings below were proper and it is respectfully submitted that this court should deny the petition.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Attorney for Respondent.

APPENDIX

Rule 54 of the Rules of Civil Procedure, 28 U.S.C.A.

"(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, * * *, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such a determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Shipping. 46 § 601

§ 601. Attachment or arrestment of wages; support of wife and minor children; State tax laws

No wages due or accruing to any master, seaman, or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a master, seaman, or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen, employed on fishing vessels as well as to seamen: *Provided*, That nothing contained in this or any preceding section shall interfere with

the order by any court regarding the payment by any master or seaman of any part of his wages for the support and maintenance of his wife and minor children: *And provided further,* That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them.

As amended Sept. 14, 1959, Pub.L. 86-263, 73 Stat. 551; Apr. 25, 1968, Pub.L. 90-293, § 1(d), 82 Stat. 108.

Plaintiff's Exhibit 4.

June 16, 1967

Hudson Water Ways Corp.
Chase Manhattan Plaza
New York, N.Y.

Re: LEWIS v. TRANS ORLEANS

Gentlemen:

This is to advise you that we have been retained by the above named REGINALD LEWIS to prosecute his claim against the above named vessel and persons responsible therefore for damages and injuries sustained during the course of employment aboard the said vessel, and for wages due and for liquidated damages pursuant to provisions of 46 USCA section 596, and 597 by reason of the withholding of wages from him.

Very truly yours,

LEBOVICI AND SAFIR

By: .....
Herbert Lebovici

HL:ek

Except to Charge.

January 24, 1972

Before: Hon. Dudley B. Bonsal, District Judge, and a jury.

(Exceptions to the Court's charge.)

Mr. Cichanowicz: Also, on the wage case, to constitute sufficient cause it is not necessary that the reason for withholding must be some legal ground.

The Court: I didn't say anything about legal ground. I think I covered the contentions with respect to that and whether they thought it was unreasonable.

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SUPREME COURT

Supreme Court, U.S.
FILED
AUG 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM,. 1973

No. 73-2020

REGINALD LEWIS,

Petitioner,

-against-

HUDSON WATERWAYS CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-2020

REGINALD LEWIS,

Petitioner,

-against-

HUDSON WATERWAYS CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner respectfully submits the following reply to the answering brief of the respondent herein.

I.

Points I and II of respondent's "ARGUMENT" relate to the setting aside of the jury verdict for earned wages directed by the Court and for statutory liquidated damages

awarded by the jury at the first trial. Recovery was also had at the first trial for personal injuries suffered by the petitioner but with respect to which there is no issue on this petition for *certiorari*. After the first trial without even a request for such relief in the Notice of Motion, the trial court set aside a directed verdict for the wages themselves. On motion papers to set aside the jury's verdict that the earned wages had been "unreasonably withheld", the respondent requested relief.

> " . . . setting aside the jury verdict on all the issues submitted to the jury [including a separate recovery for personal injuries] and enter judgment for defendant notwithstanding the verdict; or, *in the alternative for a new trial on all the issues submitted to the jury pursuant to Rule 59(a-1) of the Federal Rules of Civil Procedure* . . . " (Emphasis added)

The supporting affidavit for this Notice of Motion argued at great length the reasons for such relief with respect to the recovery for personal injuries had by the plaintiff, but added nothing of consequence to the boiler plate of the Notice of Motion that could indicate a reasoned basis for the lower court's order setting aside the jury's verdict that the wages were "unreasonably withheld".

The argument of the respondent therefore, that the "motion papers" provided the reasons adopted by the court for its action, amount to nothing more than a claim that the result may be achieved by fiat, or by counsel's label in the Notice of Motion.

The constitutional right to a jury trial is hardly preserved if it may be set aside upon no further showing than reference to a rule of procedure which may or may not be applicable (the rule referred to applied equally with respect to petitioner's recovery for personal injuries).

To support its argument, the respondent cites *Gilliland v. Lyons*, 278 F.2d 56, wherein it is stated that "as a general rule" the grounds for the motion may be obtained from the motion papers. But here the motion papers said nothing of consequence as grounds for setting aside the jury's verdict with respect to the statutory wage. Furthermore, in the *Gilliland* case the court was able to demonstrate the basis on which the lower court acted in affirming the decision of the lower court from the papers themselves, in a much narrower and different context. The situation there was entirely different from that here where no valid basis appears in the record for disturbing the jury's verdict.

The Constitution does not say " . . . no fact tried by a jury shall be otherwise re-examined . . . except by arbitrary judicial fiat . . . ".

The verdicts of the first trial should be re-instituted.

II

Assuming that the question of the second trial is reached, respondent's "ARGUMENT" at Point III of its opposing brief, is contrary to what it seeks to affirm. The

Court of appeals concedes that error was committed by the lower court (7a) but would hold the error harmless. Respondent still argues however that the ruling complained of was not erroneous and would justify the conduct of the trial on the basis of erroneously admitted evidence.

Respondent also admitted that the basis on which it defended the case was on the basis of claims of which it was not aware of until, allegedly, the occurrence of pre-trial discovery by it, approximately a year subsequent to the withholding of the wages. This contention completely ignores the principle established by case law and by 46 USCA 642 that the ground for withholding of wages earned by a seaman must be asserted by it at the time the seaman is discharged, rather than arising from the newly discovered contentions dredged up long after the fact.

III

THE VERDICTS OF THE FIRST TRIAL SHOULD BE RE-INSTITUTED, AND IN ANY EVENT, THE MATTER REMITTED TO THE LOWER COURT FOR NEW TRIAL PURSUANT TO THE RULING OF THIS COURT.

Respectfully submitted,

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By NATHAN BAKER
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HERBERT LEBOVICI
Of Counsel

Dated: New York, New York
August 21st, 1974